

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
Bankruptcy Appeal

In Re:
VALLEY MEDIA, INC.,
Bankruptcy Case No. 01-11353

COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF REVENUE

Appellant/Creditor,

v.

VALLEY MEDIA, INC.,

Appellee/Debtor.

Civil Action No. 05-179 (JJF)

SUR-REPLY BRIEF FOR APPELLEE
VALLEY MEDIA

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Appellee responds to three points raised by Appellant in its Reply Brief filed with the Court on July 18, 2005.

First, the term “agent,” as used within Massachusetts General Laws c. 64H § 1, refers to the agent of the owner or former owner.¹ It does not refer to the “agent” of a retailer not engaged in business in the commonwealth.

Second, Appellant’s comparison of the amended statute to the statute at issue in this case fails to acknowledge that the Massachusetts legislature added the following key phrase to the amended statute: “. . . regardless of any contrary statutory or contractual terms concerning the passage of title or risk of loss which may be expressly or impliedly applicable to any contract or other agreement or arrangement for the sale” Furthermore, Appellant has not cited to any cases that have acknowledged its longstanding interpretation of the statute. Appellant’s interpretation was not the law during the periods at issue in this case.

Lastly, Appellant’s contention that it has not, and will not, impose a use tax against the Massachusetts customers is misleading. It is not within Appellant’s discretion

¹ Massachusetts General Laws c. 64H, § 1 provides that “a sale of services or tangible personal property or both for any purposes other than resale in the regular course of business. The delivery in the Commonwealth of tangible personal property by an owner or former owner thereof, or by a factor, or *agent of such owner, former owner or factor*, if the delivery is to a consumer or to a person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in the Commonwealth, is a retail sale in the Commonwealth by the person making the delivery. He shall include the retail selling price of the property in his gross receipts.” (emphasis added).

to decide whether to impose a use tax against the Massachusetts customers.² By law, the Massachusetts customers must self-assess the use tax on their Massachusetts Income Tax Return³ and are not relieved of this obligation unless: (1) the tax has been paid; or (2) they possess a receipt that shows that the tax has been collected.⁴

Respectfully submitted,

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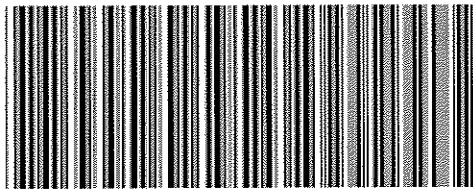
² “Every person storing, using or otherwise consuming in the commonwealth tangible personal property or services purchased from a vendor shall be liable for the tax imposed by this chapter.” MASS. GEN. LAWS ch. 64I, § 3; *see also* MASS. REGS. CODE tit. 830, § 64H.6.7(3)(b)(4).

³ See Line 33 of the Form 1 Massachusetts Resident Income Tax Return attached hereto as Exhibit A.

⁴ “His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor engaged in business in the commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commissioner may prescribe, to collect the tax and who is, for the purposes of this chapter, regarded as a vendor engaged in business in the commonwealth, given to the purchaser pursuant to section four, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.” MASS. GEN. LAWS ch. 64I, § 3.

EXHIBIT A

FORM 1 MASSACHUSETTS RESIDENT INCOME TAX RETURN

**2004 Form 1 MA0400111015****Massachusetts Resident Income Tax Return**

FOR FULL YEAR RESIDENTS ONLY

For the year January 1-December 31, 2004 or other taxable

Year beginning

Ending

Taxpayer deceased

Spouse deceased

APT NO

Name/address changed since 2003

State Election Campaign Fund:

\$1 You \$1 Spouse, if filing jointly TOTAL ▶ \$

1. **Filing status** (select one only): Single Married filing joint return Married filing separate return
Head of household2. **Exemptions:** Fill in if noncustodial parent

a. Personal exemptions

a

b. Number of dependents. (Do not include yourself or your spouse.) Enter number ▶

x \$1,000 = b

c. Age 65 or over before 2005 You + Spouse = ▶

x \$700 = c

d. Blindness You + Spouse = ▶

x \$2,200 = d

e. Other: 1. Medical/dental ▶ 2. Adoption ▶

1 + 2 = e

f. Total exemptions. Add items a, b, c, d and e. Enter here and on line 18

▶ 2f

3. Wages, salaries, tips

▶ 3

4. Taxable pensions and annuities

▶ 4

5. Mass. bank interest: a. ▶ - b. exemption

= 5

6. Business/profession or farm income or loss

▶ 6

7. Rental, royalty and REMIC, partnership, S corp., trust income/loss

▶ 7

8. Unemployment: a. ▶ ☐ Mass. lottery winnings: b. ▶☐ a + b = 8

9. Other income from Schedule X, line 5

▶ 9

10. TOTAL 5.3% INCOME

10

11. Amount paid to Soc. Sec. Medicare, R.R., U.S. or Mass. Retirement

a. You ▶ + b. Spouse ▶

a + b = 11

12. Child under age 13, or disabled dependent/spouse care expenses

▶ 12

13. Number of dependent member(s) of household under age 12, or dependents age 65 or over (not you or your spouse) as of 12/31/04, or disabled dependent(s)

Not more than two. a. ▶ ☐

x \$3,600 = 13

14. Rental deduction. a. ▶

+ 2 = ▶ 14

15. Other deductions from Schedule Y, line 10

▶ 15

SIGN HERE. Under penalties of perjury, I declare that to the best of my knowledge and belief this return and enclosures are true, correct and complete.

Your signature

Date

Print paid preparer's name

EDWARD DEFRANCESCHI

Paid preparer's SSN or PTIN

▶ 220-40-4930

Spouse's signature (if filing jointly)

Date

Paid preparer's phone

617-723-6068

Paid preparer's EIN

▶ 04-2992410

May the Department of Revenue discuss

this return with the preparer shown here?

▶ Paid preparer's signature

Date

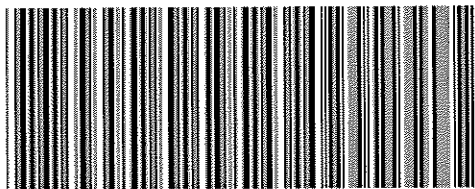
Check if self-employed

(see instructions) ▶ Yes

07/20/05

I do not want preparer to file my return electronically ▶

(This may delay your refund)

**2004 Form 1, pg. 2** MA0400121015

Massachusetts Resident Income Tax Return

16. **Total deductions.** Add lines 11 through 15 ▶ 16
17. **5.3% INCOME AFTER DEDUCTIONS.** Subtract line 16 from line 10. **Not less than "0"** 17
18. Exemption amount 18
19. **5.3% INCOME AFTER EXEMPTIONS.** Subtract line 18 from line 17. **Not less than "0"** 19
20. **INTEREST AND DIVIDEND INCOME** ▶ 20
21. **TOTAL TAXABLE 5.3% INCOME.** Add lines 19 and 20 21
22. **TAX ON 5.3% INCOME.** Note: If choosing the optional 5.85% tax rate, fill in and multiply line 21 and the amount in Schedule D, line 20 by .0585 22
23. **12% INCOME.** Not less than "0." a. x .12 = 23
24. **TAX ON LONG-TERM CAPITAL GAINS.** Not less than "0." Fill in if filing Schedule D-IS ▶ 24
Fill in if any excess exemptions were used in calculating lines 20, 23 or 24 ▶
25. Credit recapture amount BC EOA LIH ▶ 25
26. If you qualify for No Tax Status, fill in and enter "0" on line 27 ▶
27. **TOTAL INCOME TAX.** Add lines 22 through 25 27
28. Limited Income Credit ▶ 28
29. Other credits from Schedule Z, line 3 28 + 29 = 30
31. **INCOME TAX AFTER CREDITS.** Subtract line 30 from line 27. **Not less than "0"** 31
32. Voluntary Contributions: a. Organ Transplant Fund ▶ b. Endangered Wildlife
Conservation ▶ c. Massachusetts AIDS Fund ▶
d. Massachusetts United States Olympic Fund ▶ **Total of a, b, c and d** 32
33. Use tax due on out-of-state purchases. If no use tax due enter "0" ▶ 33
34. **INCOME TAX AFTER CREDITS PLUS CONTRIBUTIONS AND USE TAX.** Add lines 31 through 33 34
35. Massachusetts income tax withheld ▶ 35
36. 2003 overpayment applied to your 2004 estimated tax ▶ 36
37. 2004 Massachusetts estimated tax payments ▶ 37
38. Earned Income Credit. a. Number of qualifying children ▶ Amount from U.S. return ▶ x .15 = ▶ 38
39. Senior Circuit Breaker Credit ▶ 39
40. Payments made with extension ▶ 40
41. **TOTAL TAX PAYMENTS.** Add lines 35 through 40 41
42. **Overpayment.** Subtract line 34 from line 41 ▶ 42
43. Amount of overpayment you want **applied to your 2005 estimated tax** ▶ 43
44. **Refund.** Subtract line 43 from line 42. Mail to: Massachusetts DOR, PO Box 7001, Boston, MA 02204 ▶ 44

Direct deposit of refund. Type of account ▶ checking savingsRTN # ▶ account # ▶

45. **Tax due.** Mail to: Massachusetts DOR, PO Box 7002, Boston, MA 02204 ▶ 45
Interest ▶ Penalty ▶ M-2210 amt. ▶

EX enclose
Form M-2210